

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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GOLDEN BETHUNE-HILL, et al.

vs.

VIRGINIA STATE BOARD OF  
ELECTIONS, et al.  
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: Civil Action No.  
: 3:14CV852  
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: February 24, 2015  
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COMPLETE TRANSCRIPT OF THE CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Hello. This is Bethune-Hill against Virginia State Board of Elections, civil 3:14CV852. If you will, start with the plaintiff and say who is here representing whom, and each time you speak, please give your name.

MS. KHANNA: This is Abha Khanna representing the plaintiffs.

MR. TROY: Judge, this is Tony Troy on behalf of all the defendants.

MS. McKNIGHT: Your Honor, this is Kate McKnight, and along with Mark Braden and Jennifer Walrath, we represent the intervenor defendants.

THE COURT: All right. I've reviewed your proposed joint initial pretrial scheduling and discovery plan, and I have some questions about it for you. First, you've done your Rule 26 exchanges. Now, what does the case look like now that you've had those exchanges in terms of the amount of discovery that you think you're going to need to do, depositions, et cetera, plaintiff?

MS. KHANNA: Yes, Your Honor. This is Abha Khanna. I believe that looking at everybody's initial disclosures pursuant to Rule 26(a)(1), I think we all have a similar idea that the kinds of witnesses we're going to

1 want to depose, and I think an approximate number, I think  
2 we've all designated several sitting delegates and other  
3 members of the legislature and state who would have  
4 information about the 2011 redistricting.

5 So it seems to me that -- I mean -- I think that  
6 we're talking in the ballpark of at least ten depositions  
7 per side, and perhaps more if need be. There was a fair  
8 number, fair bit of overlap among the various initial  
9 disclosures, so it actually might fit into the amount  
10 allowed for by the federal rules. So I guess it hasn't  
11 really changed plaintiffs' perspective of the size of the  
12 case, and especially given that I believe the intervenors'  
13 and defendants' initial disclosures were consistent with  
14 plaintiffs' understanding.

15 THE COURT: You say you think there are ten per  
16 side? Is that what you said that will be needed?

17 MS. KHANNA: Yes, Your Honor. In the proposed  
18 plan that we gave, we suggested that the number of  
19 depositions should be governed by Federal Rule of Civil  
20 Procedure 30 which, I believe, allows for ten depositions  
21 per side without leave of Court, and then, of course, with  
22 good cause, to seek leave of Court if additional  
23 depositions are required.

24 THE COURT: What do the defendants and the  
25 intervenors say about that?

1 MR. TROY: Judge, this is Tony Troy. I'll let  
2 the intervenors go first and then respond, if I may, Your  
3 Honor.

4 MR. BRADEN: Your Honor, we expect the number of  
5 witnesses that we would likely call at trial to be in the  
6 range of six to eight. We most certainly would be  
7 comfortable with contemplating only ten depositions of the  
8 other side if they're not planning on calling more  
9 witnesses than that.

10 MR. TROY: Judge, this is Tony Troy. I think ten  
11 per side as allowed by the rules is doable. The hesitancy  
12 that I have, there are 12 districts that are being  
13 challenged, so we're looking at 12 different delegates.  
14 That doesn't mean that each and every one of them, of  
15 course, has to be deposed, and we're looking at two or  
16 three expert witnesses in addition. So I would hope that  
17 everything could be done with the ten per side, Your  
18 Honor.

19 THE COURT: When you say per side, are you all  
20 saying ten for the plaintiffs, ten for the defendants, and  
21 ten for the intervenor defendants, or are you saying ten  
22 for the plaintiffs' side and ten for the defendants' side?  
23 That's what I was --

24 MR. BRADEN: It would seem unlikely that the  
25 defendants and defendant intervenors would not have this,

1 you know, basically be doing depositions of the same  
2 plaintiff witnesses.

3 MS. KHANNA: Your Honor, this is Abha Khanna for  
4 the plaintiffs again, and I would agree with that, that we  
5 would probably be talking ten per plaintiffs' side and  
6 then ten for the side of both defendants and defendant  
7 intervenors as a whole, and when I mentioned the word --  
8 the number ten, I was really just referring to our -- what  
9 we've outlined in the proposal which is we abide by  
10 Federal Rule of Civil Procedure 30 and not that that be a  
11 hard and fixed number but that we approximate to get  
12 within that number, and then if need be, have the parties  
13 cooperate to extend further depositions if required.

14 THE COURT: Who was it that was speaking before  
15 you?

16 MR. BRADEN: Mark Braden speaking for the  
17 plaintiff intervenors. Assuming -- my view is that the  
18 plaintiff intervenors -- defendant intervenors and the  
19 defendants are unlikely to have different plaintiff  
20 witnesses which they desire to depose.

21 THE COURT: And you're talking about fact  
22 witnesses.

23 MR. BRADEN: That's correct, and their experts.

24 THE COURT: You mean ten including experts?

25 MR. BRADEN: Well, that's our issue. We really

1 don't know how many -- we most certainly intend to depose  
2 any witnesses that they intend on calling, and, of course,  
3 we don't know how many those are. So if they're going to  
4 call each member who represents a district, that's 12, and  
5 I'm assuming, given the nature of the case, that they are  
6 going to have at least one expert witness if not more.

7 So we would want to depose any individuals that  
8 they intend on calling, but we simply just don't know what  
9 that number is now.

10 THE COURT: Well, Mr. Troy, what is your view?

11 MR. TROY: Well, Your Honor, again, Tony Troy.  
12 The practical problem here, Judge, is though I represent,  
13 quote, defendants, the defendants, as Your Honor knows,  
14 are state election officials. They really implement  
15 whatever law is on the books.

16 The real issue here, and I haven't been able to  
17 talk to the 12 delegates, for example, I don't know what  
18 their views are. Maybe some like their districts, maybe  
19 some don't, and so that's the quandary. The real  
20 question, from a fact standpoint really, though I have  
21 access to my clients, they have no facts. They just  
22 administer election laws. The real facts are held by the  
23 various members of the General Assembly, especially the 12  
24 delegates whose districts are being challenged.

25 THE COURT: Those are the intervenor defendants.

1           MR. TROY: No, sir. Well, Your Honor, I don't  
2 know the answer to that, because Mr. Braden indicates he  
3 represents the speaker and the House of Delegates as an  
4 entity but not necessarily every member of the House of  
5 Delegates is -- I thought that was his position.

6           MR. BRADEN: And that is -- this is Mark Braden.  
7 That is our position. We simply do not know whether these  
8 12 members -- it would be our view that absent them  
9 waiving legislative privilege, it would be unlikely that  
10 we could depose them. So it's really a question, in our  
11 mind, as to the scope of discovery, as to the scope of the  
12 proposed or likely evidentiary presentation by the  
13 plaintiff.

14           THE COURT: Well, is it correct or not correct  
15 that the individual delegates were consulted by the people  
16 who drew -- responsible for drawing up the district and --

17           MR. BRADEN: The answer --

18           THE COURT: Excuse me. And that those people  
19 actually provided their views on whether the district was  
20 appropriate or not?

21           MR. BRADEN: Mark Braden. I believe in most  
22 cases, that factually is correct. I do not know about all  
23 of the districts, but I do believe for most, if not all,  
24 the individual members, as part of the legislative  
25 process, were consulted in the drawing of the plan, yes.



1 THE COURT: And there are 12 of those people;  
2 right?

3 MR. BRADEN: That are 12 of those, yes.

4 THE COURT: And they are not represented in this  
5 action even though they are current members of the House  
6 of Delegates?

7 MR. BRADEN: We represent the House of Delegates.  
8 We do not necessarily represent any individual member  
9 other than the speaker.

10 THE COURT: How can you represent the House of  
11 Delegates and not represent the 12 delegates therein whose  
12 seats are being challenged? I'm having trouble with that.

13 MR. BRADEN: Well, the issue is, I believe, the  
14 notion of whether or not we would actually represent their  
15 interests and whether they would wish us to represent  
16 them. The reality, of course, in this case, is that there  
17 is the elephant in the room and the donkey in the room  
18 which is this is a very partisan matter, so the interest  
19 of the individual members of the house who might be of a  
20 different party than the majority who voted for it might  
21 have a different interest than the actual House of  
22 Delegates.

23 Clearly, the House of Delegates has an interest  
24 in preserving the plan that it passed. That does not  
25 necessarily mean each individual member of the House

1 shares that individual interest.

2 THE COURT: Well, have they been asked whether  
3 they -- or do you know whether those 12 people want  
4 representation or are going to appear by counsel at all?

5 MR. BRADEN: I have not spoken to any of the  
6 actual 12 members, although we have discussed that with  
7 the speaker and do intend to contact them, but we are not  
8 presently representing them.

9 THE COURT: How many of the 12 are Democrats and  
10 how many are Republicans and how many Independents?

11 MR. BRADEN: Mark Braden. I believe all of the  
12 12 are members of the Democratic Party. I believe that's  
13 correct.

14 MR. TROY: Your Honor, Tony Troy. Some of them,  
15 I can think of one or two examples, were not in office  
16 when the 2011 plan was adopted. One specific is due this  
17 year, and the seat that was previously held, that person  
18 is now in the state Senate.

19 THE COURT: But they're all Democrats; is that  
20 right?

21 MR. TROY: Your Honor, Tony Troy. I believe that  
22 is correct.

23 THE COURT: Well, is there any reason you all  
24 can't talk to these people?

25 MR. TROY: Your Honor, Tony Troy. I just wanted

1 to be sure in approaching them that I was not approaching  
2 someone already represented, and Mr. Braden indicated as  
3 he stated, he does not represent the individual members.  
4 I am going to be able to have more access to them at the  
5 end of this week when the Assembly adjourns.

6 THE COURT: Okay. The question of privilege was  
7 raised in your papers, your filing, and yet there's no  
8 particular way of sorting out the privilege issue that's  
9 specified. What is the volume of the privilege claims, A,  
10 by the plaintiffs? Do the plaintiffs have any privilege  
11 claims?

12 MS. KHANNA: Your Honor, this is Abha Khanna for  
13 the plaintiff. Plaintiffs do not have any specific claim  
14 of privilege other than the ordinary attorney-client  
15 privilege and attorney work product privileges. I believe  
16 the issue of privilege that we discussed during our Rule  
17 26(f) conference was mostly the legislative privilege  
18 which I understand would be in the intervenor defendants'  
19 hands to raise, and I'm not sure if we specifically  
20 discussed it on our call, but I would understand that the  
21 way it would be -- that it would arise is upon issuance of  
22 discovery or deposition notices.

23 THE COURT: When are you filing written  
24 discovery?

25 MS. KHANNA: We're in the process of drafting

1 discovery now, and we hope to issue that as soon as we  
2 can. We certainly don't want to unnecessarily delay any  
3 part of the case.

4 THE COURT: It's been a month almost since we  
5 talked, three weeks. You all haven't gotten your  
6 discovery out yet?

7 MS. KHANNA: Not yet, Your Honor. I think we've  
8 learned a lot from the initial disclosures from each of  
9 the parties, and we will certainly be getting out our  
10 first round of discovery very soon.

11 THE COURT: What does "very soon" mean?

12 MS. KHANNA: We would hope by the end of the week  
13 if not early next week.

14 THE COURT: What about the defendants and the  
15 intervenor defendants, what written discovery are you  
16 going to do?

17 MR. BRADEN: Your Honor, this is Mark Braden for  
18 the intervening defendants. We're in the process of  
19 making a decision on that. Frankly, we have not reached a  
20 conclusion. I assume it will be modest in comparison to  
21 the discovery, written discovery proposed by the  
22 plaintiffs in this litigation.

23 THE COURT: On what date do you propose to issue  
24 yours?

25 MR. BRADEN: Well, I have not proposed a date,

1 Your Honor, but we can most certainly meet the time frame  
2 of beginning early next week.

3 THE COURT: Mr. Troy, how much written paper  
4 discovery, et cetera, are you proposing to do, written  
5 discovery?

6 MR. TROY: Your Honor, I haven't formulated -- I  
7 anticipate minimal. Most of it would be interviews and/or  
8 depositions.

9 MS. KHANNA: Your Honor, this is Abha Khanna for  
10 the plaintiff again. I would also just like to clarify  
11 that plaintiffs, I think over a month ago, have issued  
12 FOIA requests of the state which would include state  
13 agencies as well as the state General Assembly. So we're  
14 trying to be efficient in our discovery to make sure we're  
15 not being duplicative of any FOIA requests and can make  
16 sure that we can start getting documents through that  
17 means as well.

18 THE COURT: Well, you had issued FOIA requests,  
19 my recollection is, when we talked on the telephone some  
20 three weeks ago. When are the responses due?

21 MS. KHANNA: I believe that my colleagues have  
22 been in touch with -- I think actually counsel for the  
23 defendant is also representing the state when it comes to  
24 the FOIA requests as far as handling that, and I think  
25 there's been some communications back and forth about

1 narrowing search terms and the costs for DVDs, but my  
2 colleagues in D.C., I believe, are working consistently  
3 and actively with the state to get those documents  
4 produced as soon as possible.

5 THE COURT: Slow down a little bit. Those are  
6 all somewhat amorphous statements with respect to dates.  
7 So I guess my question is, on what date were the FOIA  
8 requests issued?

9 MS. KHANNA: I'd have to check, Your Honor.

10 THE COURT: Is somebody in Washington handling  
11 that?

12 MS. KHANNA: Yes.

13 THE COURT: Where are you?

14 MS. KHANNA: I'm located in Seattle. I do have a  
15 colleague who is running point on the FOIA requests, and I  
16 know that they've been in active communication with the  
17 state to narrow it down to figure out a budget. Honestly,  
18 when it comes to the deadline or the actual date they're  
19 going to be produced, I think that's in the hands of the  
20 state right now.

21 THE COURT: Mr. Troy, are you representing the  
22 defendants on the FOIA issue?

23 MR. TROY: Yes, Your Honor. More specific, there  
24 were four FOIA requests that were sent; one to the House  
25 of Delegates, one to the state Senate, one to Legislative

1 Services, and one to the solicitor general of the Office  
2 of Attorney General. We are representing the latter only.  
3 I do know --

4 THE COURT: Wait a minute, Mr. Troy. One was  
5 sent to the Senate, one was sent to Legislative Services,  
6 and one was sent to who else?

7 MR. TROY: The House of Delegates, the state  
8 Senate, Legislative Services, and the solicitor general.

9 THE COURT: And you are representing the  
10 solicitor general only?

11 MR. TROY: Correct, Your Honor.

12 THE COURT: Who is representing the Senate, the  
13 delegates, and Legislative Services?

14 MR. TROY: Well, I don't think they have  
15 representation. I can report to the Court, based on my  
16 knowledge, that both the Senate and Legislative Services  
17 have already responded to the FOIA requests. I do not  
18 know the status yet of the House of Delegates. On behalf  
19 of the Solicitor General's Office, we have asked for  
20 confirmation on search terms so that we can then estimate  
21 the overall costs involved for production.

22 We're waiting for the plaintiffs to confirm the  
23 search terms. Once they do that, we will know the costs  
24 of production. They have to pay for that, and then they  
25 get the information that they are seeking.

1 THE COURT: Well, it seems to me that we're going  
2 to need the person who knows about this on this telephone  
3 call, so would you have one of your assistants get that  
4 person in this call, please, Ms. -- I'm sorry, I've lost  
5 your last name.

6 MS. KHANNA: Khanna. Yes. I have to say, Your  
7 Honor, I'm not aware we actually have any documents from  
8 any of the agencies.

9 THE COURT: Ms. Khanna, excuse me. That's not  
10 what I'm getting at. I want somebody on the call who  
11 knows this information. You say you don't know it. I  
12 understand you don't, but I think we need to have somebody  
13 on the call who does know it. So ask one of your  
14 secretaries or legal assistant or somebody, please, to  
15 call, get the people in Washington and get them on this  
16 call so we can -- this is fairly critical in terms of  
17 timing for everybody, and it seems to me like we haven't  
18 moved any further than when we talked three weeks ago. So  
19 can you get someone to do that?

20 MS. KHANNA: I am trying to page somebody at this  
21 very moment if he's available.

22 THE COURT: Or maybe you can email them in this  
23 wonderful world of technology.

24 MS. KHANNA: Yes, Your Honor, I'll send him that  
25 email right now.



1 THE COURT: Mr. Troy, do you know the volume of  
2 the amount with which the Senate responded?

3 MR. TROY: Your Honor, I do not, and even as Your  
4 Honor knows, I've always said I graduated from a yellow  
5 legal pad to a white legal pad. If they told me the  
6 amount of gigabytes, I don't even know what a gigabyte is,  
7 Judge.

8 MR. BRADEN: Your Honor, this is Mark Braden. I  
9 believe my associate Katherine McKnight had the most  
10 recent conversations. We do represent the clerk of the  
11 House who received a Freedom of Information request. I  
12 believe they received it prior to us intervening in this  
13 case, but they have been working on it, and, Katherine, do  
14 you have a reading on where they are in the process of  
15 responding to that request?

16 MS. McKNIGHT: I had understood -- this is Kate  
17 McKnight, and I had understood that the clerk's office had  
18 responded and had produced materials responsive to that  
19 request. I believe it was Marc Elias of Perkins Coie's  
20 D.C. office who had sent the FOIA request, and I believe  
21 they have already sent in a response.

22 THE COURT: And the response is what volume; do  
23 you know, Ms. McKnight?

24 MS. McKNIGHT: Probably about 60 to 80 pages or  
25 so of documents and a couple of CDs of floor testimony.

1           THE COURT: All right. And you are, Mr. Braden,  
2           Ms. McKnight, you are representing the House of Delegates.  
3           Do you know, either one of you, if anyone is representing  
4           the Senate or Legislative Services division?

5           MR. BRADEN: We do not represent the Senate.

6           THE COURT: I know that. I said do you know who  
7           is.

8           MR. BRADEN: I believe that the Attorney General  
9           in Virginia has the responsibility to represent the Senate  
10          unless the Senate hires separate counsel. That's my  
11          understanding of Virginia procedure in this area.

12          THE COURT: But nobody has talked to those  
13          people. All right --

14          MR. TROY: Your Honor, I'm not sure what Mr.  
15          Braden said is correct, but I am of the understanding that  
16          without seeking legal representation, responses have  
17          already been made by the Senate and by Legislative  
18          Services.

19          THE COURT: Okay.

20          MR. TROY: I received an email, I think -- I'm  
21          losing time. I think -- is today Tuesday? Yes,  
22          yesterday, from the head of Legislative Services advising  
23          that the submission had been made responding to the FOIA  
24          and that a copy of that was available to us to be picked  
25          up and that it was on a thumb drive.

1 THE COURT: Are there any objections -- do we  
2 know if there are any objections, Ms. Khanna, to any of  
3 the responses to FOIA?

4 MS. KHANNA: I'm sorry, Your Honor. I'm not  
5 aware of any objections right now, and as I mentioned  
6 before, I'm not aware of which documents have and have not  
7 been produced, so I'm trying my best to get my colleague  
8 on the line.

9 THE COURT: All right.

10 MS. KHANNA: I think somebody actually is calling  
11 in right now.

12 THE COURT: Is this a dial-in call?

13 MS. KHANNA: It should be, yes.

14 THE COURT: Okay.

15 MR. TROY: Your Honor, this is Tony Troy. I can  
16 advise the Court that in our review and response under  
17 FOIA, we are not going to be applying any FOIA exceptions  
18 on the theory or grounds that under discovery they  
19 probably could get anything that is exempt under FOIA, and  
20 so we figured we're not going to argue about it now just  
21 to have them get it later. So we're trying to make it as  
22 full as possible, Your Honor.

23 THE COURT: All right. Who is that?

24 MS. BRANCH: Hi, this is Aria Branch from  
25 Perkins.

1 THE COURT: B-r-a-n-d?

2 MS. BRANCH: Branch, like a tree branch.

3 THE COURT: All right, Ms. Branch, are you in  
4 charge of the documents in this case?

5 MS. BRANCH: Yes, I am managing them.

6 THE COURT: Here is the question: Has the Senate  
7 of Virginia responded to the FOIA request?

8 MS. BRANCH: Yes.

9 THE COURT: Are there any objections to the FOIA  
10 request that have to be resolved by this or any other  
11 court?

12 MS. BRANCH: I do not think so at this time.

13 THE COURT: House of Delegates, has the House of  
14 Delegates responded to the FOIA request?

15 MS. BRANCH: Yes.

16 THE COURT: Are there any objections that have to  
17 be resolved by this or any other court to the response of  
18 the FOIA request by --

19 MS. BRANCH: Not at this time.

20 THE COURT: Legislative Services.

21 MS. BRANCH: Yes.

22 THE COURT: Have they responded?

23 MS. BRANCH: Yes, they have.

24 THE COURT: And are there any issues or  
25 objections or problems that have to be resolved by this or

1 any other court as to the response made by the House of  
2 Delegates?

3 MS. BRANCH: Do you mean Division of Legislative  
4 Services?

5 THE COURT: I'm sorry. Thank you so much for  
6 correcting me.

7 MS. BRANCH: Not at this time.

8 THE COURT: Mr. Troy tells me that the Solicitor  
9 General has asked for search terms. Where do you stand on  
10 getting the search terms identified for Mr. Troy on behalf  
11 of the Solicitor General?

12 MS. BRANCH: I believe we sent an email to his  
13 office, I think about a week and a half ago, providing  
14 search terms.

15 THE COURT: Mr. Troy?

16 MR. TROY: Your Honor, I will have to check. The  
17 individual who is handling that on our end is in -- out of  
18 the office in a court case currently being handled today,  
19 and I will report to the Court tomorrow. It was my  
20 understanding that we were trying to finalize search  
21 terms, and I would stand -- I'm willing to stand  
22 corrected, but I think the bottom line is tomorrow we can  
23 finalize search terms, and once they are finalized, we can  
24 estimate the costs, and if the plaintiffs are willing to  
25 pay the costs, we can run those in about two or three

1 days, I would think.

2 THE COURT: Let's get that accomplished tomorrow  
3 and get the agreement to pay or not to pay or define what  
4 you want, please, Ms. Branch. What is tomorrow? Tomorrow  
5 is Wednesday? Get that accomplished by no later than  
6 Friday, produce the documents on Monday.

7 MR. TROY: I was going to say, Your Honor, that  
8 sounds reasonable, but Your Honor would say, so what. I'm  
9 sorry.

10 THE COURT: No, I wouldn't. I would be grateful  
11 for having done something reasonable. Now, that being the  
12 case, I'd like to have all written discovery posited, I  
13 believe, by March 5th. That means served. And then  
14 responses will be, according to your agreement,  
15 March 20th. And objections, according to your agreement,  
16 by March 15th -- the objections are due on the 15th. The  
17 responses are due on the 20th. The responses are the  
18 providing of the documents that are not objected to.  
19 That's according to paragraph C of your proposal. That's  
20 the schedule you set for yourselves.

21 You need to work out an agreement to settle that  
22 and get it all straight. If there's any objection to or  
23 if there's any objection, you need to get the objections  
24 straightened out and get those straightened out by March  
25 the 23rd -- 24th. Excuse me.

1 MR. TROY: Your Honor, Tony Troy. That's the  
2 date for resolving any objections among ourselves?

3 THE COURT: Among yourselves, and if you don't  
4 have them resolved, then file motions to compel on  
5 March 25th, and actually, you do it the way it's in my  
6 pretrial order which is call and let's talk about it.

7 You all get it sorted out, identify what the  
8 issues are, call in here and get a telephone conference,  
9 and we'll go from there.

10 Now, privilege documents now. You're going to  
11 get the documents, and you're going to know about the  
12 privilege, any claims of privilege on the 15th because  
13 you're going to object by the 15th. So you'll know about  
14 the claims of privilege. So you need to assert the claim  
15 of privilege -- if there's a motion to compel on the claim  
16 of privilege, you need to file that. If you will file  
17 that, please -- excuse me. The 15th is a Sunday, so you  
18 should have your objections in on the 16th.

19 The motions to compel on the basis of a privilege  
20 with briefs, et cetera, would be due -- I'm sure you're  
21 already working on the legislative privilege, are you not,  
22 Mr. Braden?

23 MR. BRADEN: Your Honor, Mark Braden. Yeah, I  
24 believe we still have some of those briefs in the word  
25 processor.

1 THE COURT: In addition to that, as I recall it,  
2 in the *Page* case, they ended up resolving all the claims  
3 of privilege.

4 MR. BRADEN: Yes, we did, and, Your Honor, I hope  
5 it will happen the same way this time.

6 THE COURT: If there are any unresolved claims of  
7 privilege, let's have those filed by March 23rd. The  
8 briefs on the motion to compel would be March 23rd.  
9 Response, March 31st; reply, April 6th. Okay?

10 Experts, plaintiffs, how many experts are you  
11 going to have and who are they? You're going to have to  
12 file the reports by March 11th. Surely you know now who  
13 they are.

14 MS. KHANNA: Yes, Your Honor. Plaintiff  
15 anticipates having only one expert, and he's going to be  
16 Stephen Ansolabehere. He's a Harvard professor.

17 THE COURT: Can you spell that name?

18 MS. KHANNA: Absolutely. It is --

19 THE COURT: Slowly.

20 MS. KHANNA: Sure. The last name is  
21 A-n-s-o-l-a-b-e-h-e-r-e. First name is Stephen,  
22 S-t-e-p-h-e-n.

23 THE COURT: And he is an expert on what, Ms.  
24 Khanna?

25 MS. KHANNA: He's an expert on redistricting and



1 voting -- racialized voting patterns.

2 THE COURT: Has he ever been involved in any  
3 Virginia cases before?

4 MS. KHANNA: I don't believe he's been involved  
5 in any Virginia cases, but he's certainly been involved in  
6 redistricting cases.

7 THE COURT: Defendants and intervenor defendants,  
8 how many experts are you having and who are they? You are  
9 due to provide yours on April 10th. Surely you know who  
10 they are.

11 MR. BRADEN: Your Honor, it's Mark Braden for the  
12 defendant intervenors. I think it's likely we will call  
13 Dr. Tom Brunell.

14 THE COURT: Tom who?

15 MR. BRADEN: Thomas Brunell.

16 THE COURT: How do you spell that? B-u-r --

17 MR. BRADEN: B-r-u-n-e-l-l.

18 THE COURT: Brunell, okay.

19 MR. BRADEN: And I believe he testified in the  
20 *Wise* case, if my memory serves me correct, ten years ago  
21 in Virginia.

22 THE COURT: Anybody else?

23 MR. BRADEN: And Dr. Tom Hofeller.

24 THE COURT: How do you spell that name?

25 MR. BRADEN: Give me one second here so I am

1 telling you right. H-o-f-e-l-l-e-r.

2 THE COURT: H-o-f-e-l-l-e-r?

3 MR. BRADEN: Yes.

4 THE COURT: Are both Toms Thomas?

5 MR. BRADEN: They are both Thomas, yes.

6 THE COURT: So now you know who each other's  
7 experts are. Now, here's the question: You all have  
8 talked to your experts. You raised the question before  
9 that there were 12 districts that needed to be dealt with.  
10 Have your experts committed to give you what you need to  
11 try this case by July 7th as to the 12 districts? Ms.  
12 Khanna?

13 MS. KHANNA: Your Honor, if I understood the  
14 question correctly, is our expert prepared to testify as  
15 to each of the 12 districts or as to our case in total by  
16 the July 7th trial date, and the answer to that is yes.

17 THE COURT: And the report will have whatever  
18 he's going to say in it on those topics on March 11th; is  
19 that right?

20 MS. KHANNA: Yes, Your Honor. That report will  
21 address his testimony in this case.

22 THE COURT: All right. Are the defendants  
23 putting on any experts? I know Mr. Braden spoke for the  
24 intervenor defendants. Are the defendants putting on any  
25 experts?

1           MR. TROY: Your Honor, we are discussing an  
2 expert on compactness issues, but we have not made a final  
3 decision at this time.

4           THE COURT: Notify them who the compactness  
5 expert is by -- can you do that by Monday?

6           MR. TROY: Yes, Your Honor.

7           THE COURT: And that is what date? The 2nd of  
8 March.

9           MR. TROY: I don't have a calendar in front of  
10 me, Judge. I apologize.

11          THE COURT: That's all right. I think that's  
12 right. It is. Okay, so you all --

13          MR. BRADEN: Your Honor, it's Mark Braden for the  
14 defendant intervenors. Dr. Brunell is most certainly  
15 locked in and is prepared to testify on these dates and  
16 have his expert report done in the manner set forth in the  
17 proposed order.

18          Dr. Hofeller, we've spoken with him, and we  
19 anticipate he'll be able to do this, but he has -- he's  
20 involved in one of the North Carolina -- actually a couple  
21 of the North Carolina election cases, and he's presently  
22 trying to juggle those to make sure that this will work.  
23 If we do not use him as a witness, we will -- we've been  
24 in contact with Dr. Jonathan Katz from Cal Tech, and he's  
25 willing to do it if we cannot make Dr. Hofeller's schedule

1 work.

2 THE COURT: Jonathan who?

3 MR. BRADEN: Katz, K-a-t-z.

4 THE COURT: And Jonathan is J-o-n-a-t-h-a-n?

5 MR. BRADEN: Yes.

6 THE COURT: But it's one or the other.

7 MR. BRADEN: That is correct. We do not  
8 anticipate -- we only anticipate having two expert  
9 witnesses.

10 THE COURT: Given the volume of discovery that  
11 you know from the Freedom of Information requests, now  
12 that you have your Rule 26 exchanges, you know what your  
13 experts can accomplish and when they can accomplish it, is  
14 there any barrier that you have identified to trying the  
15 case on the set trial date?

16 MS. KHANNA: Your Honor, this is Abha Khanna,  
17 counsel for plaintiffs. I don't believe anything that  
18 we've discussed changes our readiness and ability to try  
19 this case on July 7th.

20 THE COURT: Defendants and intervenor defendants?

21 MR. TROY: Your Honor, this is Tony Troy. I  
22 believe that we can and will meet the trial dates, July 7,  
23 8, 9 trial dates.

24 THE COURT: Before I enter this order, I want to  
25 make sure that if you all complain that it was very

1 difficult to do and that we were moving faster than we  
2 should move, and I want to make sure and report to my  
3 colleagues that the task we have set for you is an  
4 accomplishable task in perspective of your having more  
5 information about the case than you did when we originally  
6 set the date.

7 That's why I'm asking the question, and I gather  
8 from all of you that it is a doable thing. Am I correct  
9 about that?

10 MR. BRADEN: Your Honor, for the defendant  
11 intervenors, Mark Braden, the answer is yes.

12 THE COURT: All right. Mr. Troy, the answer  
13 for -- I cut you off. What is it?

14 MR. TROY: Your Honor, I indicated yes, we can  
15 and will meet the July 7, 8, 9 dates.

16 THE COURT: All right. I'm a little troubled by  
17 the dispositive motion provision. I can't understand how  
18 there'll be a dispositive motion in this case. Can  
19 somebody help me with what we're talking about there so I  
20 understand scheduling the dispositive motions?

21 MS. KHANNA: Your Honor, this Abha Khanna again,  
22 counsel for the plaintiff. During our Rule 26(f)  
23 conference, we did discuss -- I believe we all agreed that  
24 we don't believe dispositive motions are likely based on  
25 what we know of the case at this moment but that

1 consistent with the Court's usual scheduling order, and I  
2 think that the conversation that took place with the Court  
3 during the last conference call, we put in the deadline  
4 just in case to make sure we have that backstop and that  
5 the Court is provided time to resolve anything.

6 THE COURT: Well, the problem that I see with  
7 that is this: The date you have chosen, May 28th, means a  
8 reply in the ordinary course, counting the time allowed  
9 for mailing which happens with electronic filing, of  
10 course, puts the response at June 11th and a reply at  
11 June 17th, and the trial date is three weeks later or two  
12 and a half weeks later.

13 That doesn't allow much time for dealing with any  
14 dispositive motions, and so in my review of what you all  
15 have proposed and mindful that it's preferable to have  
16 discovery concluded before dispositive motions were filed,  
17 I would move the discovery cutoff forward as well as the  
18 dispositive motion date, and so before I did that, I  
19 certainly wanted to talk with you all about your  
20 discovery.

21 Certainly you can get all the fact discovery done  
22 before you have experts. So you're going to be doing fact  
23 discovery in February and March, and then your experts  
24 will have that information when they're doing their  
25 reports. You'll have the expert discovery, I would think,

1 the very first -- you don't have but three, possibly four  
2 experts. You have those depositions taken by the first of  
3 April -- the first of May or by the first week, full week  
4 in May which ends on the 8th. So why would you need to  
5 have discovery out until the 22nd I suppose was the  
6 question that I was trying to get out on the table. So  
7 help me with that, please, Ms. Khanna.

8 MS. KHANNA: Absolutely, Your Honor. I believe  
9 when we all had our conversation on the Rule 26(f)  
10 conference, we wanted to basically acknowledge that there  
11 might be a significant amount of documents to go through  
12 and a significant amount of witnesses to cull through. So  
13 we wanted to provide ourselves the time within the Court's  
14 framework for the July 7th trial date that the Court set  
15 to make sure we had enough time to get all of that taken  
16 care of which would have included resolving any discovery  
17 objections or anything that would arise in that time.

18 As I mentioned, I don't think any of the parties  
19 anticipate at this moment, based on our call, filing a  
20 dispositive motion, but we wanted to keep that deadline in  
21 there, and we wanted it to be after the close of  
22 discovery. Speaking from plaintiffs' perspective, I think  
23 our interest would be in having -- since we don't believe  
24 that dispositive motions will be necessary at this time,  
25 our interest would be in really getting ourselves enough

1 time and buffer to complete all discovery, resolve all  
2 objections, make sure any follow-up discovery is also  
3 pursued when it comes after a deposition or anything else  
4 so that we can have that time built into the schedule.

5 THE COURT: Which is why you chose the 22nd of  
6 May knowing that the rules require that the discovery  
7 cutoff means that all objections have to be brought  
8 forward and resolved in time to allow completion of  
9 discovery by the cutoff date; is that correct?

10 MS. KHANNA: Yes, Your Honor.

11 THE COURT: Counsel for the defendants, what do  
12 you all say?

13 MR. BRADEN: Mark Braden for the defendant  
14 intervenors. We share the view that dispositive motions  
15 are very unlikely. To be candid with the Court, the only  
16 possibility we think of them likely would be in a  
17 circumstance that the Supreme Court were to surprise us  
18 with some jurisprudence that's pending right now that  
19 might send this off in a different direction than we  
20 anticipate.

21 THE COURT: If that happens, we have to sort  
22 through different -- we'll just have to sort through it.  
23 I listened to the arguments on that case today to get  
24 ready for this call. I'm not quite sure exactly how that  
25 case would help resolve this case, but I can understand



1 from the thrust of some of the questioning and some of the  
2 arguments that it might depending upon -- I think it might  
3 more than I thought it would when I was just reading the  
4 briefs.

5 So if that happens, we're just going to have to  
6 assess where we stand. We can't plan against what might  
7 happen there, and we'll wait and see.

8 MR. BRADEN: Our interest in discovery really was  
9 expressed, to a large degree, by the plaintiffs' counsel  
10 where our only concern, frankly, on the discovery time  
11 frame is the question of how many depositions in total  
12 will be involved. It will be a brisk schedule but one  
13 that we can most certainly live with.

14 THE COURT: Let's leave the discovery cutoff on  
15 the 22nd. We'll leave the dispositive motion cutoff when  
16 it is and see. I was really trying to save you all  
17 expense and money in fact if you did have a dispositive  
18 motion by changing the date, but since you don't really  
19 think there's going to be any, I think we'll leave it the  
20 way you've proposed it. I understand your rationale.

21 All right, the motions *in limine*, if they're  
22 filed on the 15th -- I mean on the 5th of June, they are  
23 11 days -- 14 days later is June 19th, and six days after  
24 that is the 25th. It won't be ripe until the 25th in the  
25 ordinary course of briefing, so I don't know what kind of

1 motions *in limine* we think we're going to have. But let's  
2 see if we can't move those dates up a little bit and  
3 shorten the briefing time.

4 Why don't we do this on motions *in limine*: File  
5 motions *in limine* by the 29th of May and file reply briefs  
6 by the 5th of June, response briefs by the 5th of June and  
7 reply briefs by the 12th of June. I doubt you're going to  
8 really have any motions *in limine*. All right? 5/29, 6/5,  
9 and 6/12. Is that what I said?

10 MS. KHANNA: Yes, Your Honor.

11 THE COURT: If something comes up and there's a  
12 big issue and we need to adjust these schedules, that's,  
13 in part, what we have to do by keeping in touch with each  
14 other. All right. I'd like for you all then to revise  
15 this schedule. In addition -- do you have a disk or  
16 some -- I don't know what the right technology is. Who  
17 prepared this, the plaintiff or the defendant?

18 MS. KHANNA: Your Honor, this is Abha Khanna.  
19 Plaintiffs' counsel prepared the document and received the  
20 input of all the other parties.

21 THE COURT: Do you have a way of getting to me  
22 this basic document, to Mr. Parsons so that we can use it  
23 as a predicate without retyping the whole thing?

24 MS. KHANNA: Absolutely. I can send the Word  
25 document version to Mr. Parsons.

1           THE COURT: That's fine. Then the other thing is  
2 I will provide in here that the initial Pretrial Schedule  
3 A that is listed in here will -- that I'll list in here,  
4 and it's Pretrial Schedule A that's in effect in all cases  
5 assigned to me, will be in effect -- that and the  
6 scheduling order will be in effect and controlling unless  
7 superseded by explicit provisions of this order, and that  
8 will be in here. I'll modify it that way.

9           Are there going to be any additional parties  
10 joined? You said you were going to file it ten days from  
11 the date of this filing. I don't know whether you meant  
12 tendering the proposed order or the date it was entered,  
13 but do you know of any additional parties, either one of  
14 you?

15           MS. KHANNA: Your Honor, counsel for plaintiffs  
16 are not aware of any additional parties that would be  
17 joining.

18           THE COURT: All right.

19           MR. BRADEN: Intervenors are not either.

20           THE COURT: I have this question for you,  
21 defendants and intervenors: In the Richmond  
22 Times-Dispatch a couple of weeks ago, there was an  
23 indication that there were a number of -- that members of  
24 the House of Delegates whose seats were at issue here, the  
25 districts that were at issue weren't happy with the notion

1 of a lawsuit. Has anybody talked to any of those people?  
2 You know what you read in the paper and you don't know  
3 what that really means, but has anybody talked to them  
4 about whether they want in on the action here or are  
5 hiring lawyers?

6 MR. BRADEN: Your Honor, from the defendant  
7 intervenors, I've spoken with a number of members of the  
8 House obviously in regards to this litigation. I have not  
9 seen the article in the Richmond Times-Dispatch, so I  
10 can't comment upon those individuals, but no one that I  
11 spoke to indicated any desire to join the litigation  
12 separately.

13 THE COURT: I don't think -- the article didn't  
14 mention any of the people. It just said affected  
15 delegates I think is what it said, something like that.  
16 You know how reliable that can be.

17 MR. BRADEN: Yes, Your Honor.

18 THE COURT: So my point was that nobody knows of  
19 anybody who wants in, so we'll just proceed without them.  
20 That's their business. They know what they can do if they  
21 want to. All right.

22 MR. TROY: Your Honor, this is Tony Troy. To the  
23 extent it helps, I know that members of the Black Caucus,  
24 most, if not all, of the 12 districts in question were  
25 apprised of the lawsuit. I do not have enough information

1 to know their reactions or their intents.

2 THE COURT: That's fine. As long as I don't have  
3 to deal with it, that's all right with me. I don't need  
4 to get into that thicket. All right, you have a provision  
5 in here about discovery summaries. I don't think that's  
6 going -- I don't think that's a productive use of your  
7 time in this case, and it can end up being expensive, so  
8 why don't we exclude that from the pretrial order. When I  
9 get to editing it, that's what we'll do, is take that out  
10 unless you all particularly want it.

11 MS. KHANNA: No, Your Honor. We see no reason  
12 for that.

13 MR. BRADEN: No, Your Honor, from the  
14 intervenors.

15 THE COURT: All right. Now, if you're going to  
16 be -- let me tell you how we like to see the depositions.  
17 I prefer and I think all the judges prefer not to have  
18 depositions. But that said, we recognize that there may  
19 be.

20 If you are going to have them, what you do is you  
21 tender a deposition with the cover page and just the parts  
22 that are designated, not the whole deposition, just the  
23 pages that are designated including the fairness  
24 designations in order that they appear, in other words, so  
25 that the fairness context appears. And if there are any

1 remaining objections that you all have not resolved, then  
2 you are to highlight in one color the testimony being  
3 offered by the plaintiff and highlight in another color  
4 the testimony being offered by the defendants to which  
5 there is an objection, and annotate in the margin what the  
6 objection is, Rule 403, Rule 803(6), whatever it is. Then  
7 we'll rule on the objections once we get that done.  
8 That's what you do after you kind of winnow down through  
9 the process you have outlined in paragraph 11. Do you  
10 understand what I'm saying?

11 MS. KHANNA: Yes, Your Honor. This is counsel  
12 for plaintiff.

13 MR. BRADEN: Yes, Your Honor.

14 THE COURT: So all we want is the testimony  
15 that's actually being offered. Now, there's two ways to  
16 do that. If you've got a page and you only have one or  
17 two lines on it. You can either put something on and  
18 cover it out and copy it or do what you want to do, or you  
19 can bracket it on the right-hand margin and left-hand  
20 margin so we know where it is. Then we won't read  
21 anything but the bracketed text.

22 Are you with me so far? Ms. Branch, you're  
23 probably going to end up doing this. Do you follow me?

24 MS. BRANCH: Yes, Your Honor.

25 THE COURT: If you all have some better way to do

1 it, that's fine, but what we want is just to know what you  
2 are offering, and of those things that you're offering, if  
3 there are any unresolved objections, we want to know who  
4 is making them. Pick a color. I usually use blue for the  
5 plaintiff and yellow for the defendant, and then annotate  
6 in red pen or something out to the margin the basis for  
7 the objection by word or by rule number or both. Does  
8 that help out?

9 MS. KHANNA: Yes, Your Honor. That makes it very  
10 clear.

11 THE COURT: If you have any questions, you can  
12 call. I've done all the talking and raising the questions  
13 so far. Are there any questions or problems that you all  
14 have to raise?

15 MS. KHANNA: Nothing further from the plaintiffs,  
16 Your Honor. We appreciate your time.

17 MR. BRADEN: Nothing from the intervenors, Your  
18 Honor.

19 MR. TROY: Nothing further from the defendants,  
20 Your Honor. This is Tony Troy.

21 THE COURT: All right. Do you all want a copy of  
22 this transcript so that you can know exactly what went on  
23 and who struck John and said what?

24 MR. TROY: I think that would be helpful.

25 THE COURT: Everybody want one?

